

Punishment and Sentencing Policy in India: A Critical Analysis

¹Dr.Akhilesh Ranaut & ²Vijay Kumar

¹Professor, University Institute of Legal studies, Chandigarh University, Mohali, Punjab (India)

²Research scholar, University Institute of Legal studies, Chandigarh University, Mohali, Punjab (India)

ARTICLE DETAILS

Article History

Published Online: 15 April 2019

Keywords

Sentencing, Punishment

ABSTRACT

Sentencing systems throughout the India have experienced great change over the past years. Sentencing policy is often the target of reform as policymakers, judges, and other judicial decision makers grapple with the issues of discretion, sentencing disparity, and sentence severity.

In India as known, no formal guidelines exist and judges retain wide discretion in sentencing, but the country has mechanism in place to provide general guidance- in India through a series of court decisions that identify relevant sentencing factors. The present study examines the sentencing systems in the country and the very need of sentencing guidelines for proper functioning and effectiveness in justice. The analysis indicates that legally prescribed factors are the primary determinants of sentencing across all the countries justice system. This is followed by a discussion of different opinions on sentencing policy – their focal points and inconveniences. Our outlook on rape has changed drastically in the last two decades. Courts as well as the legislature has laid down exacerbated punishment for the rape offenders. So, trends in rape sentencing deserve a mention in this study.

1. Introduction

The introductory chapter discusses the concept of sentencing policy in India with special reference to Rape

Statement of the Problem

A paramedical student was tortured by six men to such an extent that an iron rod was shoved into her vagina and her intestines, abdomen, and genitals were damaged severely. They threw her out of the bus in the wintery night.

One of the accused was juvenile and was sent to a reform facility for three years. One of the accused committed suicide in the jail and rest were given the death penalty.¹

Real-life stories like this one are not uncommon. Crime and criminal justice are among the most observed, most debated topics in contemporary society. It would be a rare event if an evening of nightly television or an edition of a popular newspaper or magazine did not include several prominent criminal-justice related themes. The way society deals with those who violate the law is among the most conspicuous issues regarding crime and criminal justice.

In the aftermath of the criminal tragedy or terrorist attack, lawmakers, judges, prosecutors, and even the governor were all either blamed or called upon “to do something” about the sentencing of criminals like the above mentioned. Highly salient crimes such as the rape and murder are often the impetus for calls for reform of the punishment system in this country. While many reform advocates push for increased severity, others, are of the view to decrease the harshness of the punishment in the sentences.

The controversy created by criminal sentencing is frequently at the forefront of criminological and criminal justice debate. This is at least in part due to the importance of the issue in the various realms of politics, academics, economics, and morality.

Perhaps more than at any other point in the criminal process, the sentencing decision represents the juncture at which the criminal law, the criminal justice system, and the public’s values are translated into tangible action.

Chapter 2 deals with the historical background of the Sentencing in Indian law. Moving on to the Chapter 3 of the study entails the related definitions and meanings. Thereafter the Chapter 4 provides an analysis on Sentencing Policy giving a brief idea of prevailing scenario and strategy on Sentencing.

Chapter 5 details Provision on rape, its legal framework in India, the position of Rape Sentence and Judicial approach on it. Chapter 6 of study provides the literature review, followed by the chapter 7 for Judicial Mandates. Chapter 8 of the research is regarding the conclusions and suggestions on the study.

Historical Background

When we look at the history of India, we will find that the concept of Penology is embedded in it, right from the beginning. It developed under the connotation of *danda-niti* which literally means principle of punishment². *Manu*, the great law-giver of India, emphasized that *Danda* was created as a derivative of *Dharma*³.

The “Manava-Dharamsatra” (Manu’s Code of Law), explains “The Law for the King” on punishments. It says in

¹ (2014) 13 SCC 318
<http://www.thehindu.com/news/national/article18390998.ece/binary/Su-premeCourtverdict>

² Dhawan, S.S., *The Lucknow Law Journal*, Vols. XIII and XIV, 1967-68, pp. 9-30

³ Manusmriti, VII-3, 4, 15, 18, 22

Chapter 7 that “the king should administer appropriate punishment on men, who behave improperly” and that “punishment disciplines all the subjects, punishment alone protects them and watches over them as they sleep- Punishment is the Law, the wise declare.”⁴ Though Criminology is a modern growth in the West but in reality it was a fully developed subject in our country before the dawn of Christian era. We have an abundance of literature on *danda-niti* or criminology contained in our *Dharmashastras* such as *Vedas*, *Smritis*, *Kautilya’s Arthashastras*. The first phase of ancient civilization in India, when *Dharma* was supreme, the offender was shown maximum tolerance, but was gradually ousted by political authority of the State in the following Mughal and British periods.

To emphasize the need for punishments in order to maintain social order he adds “if the king fails to administer punishment tirelessly on those who ought to be punished, the stronger would grill the weak like fish on a spit; crows would devour the sacrificial cakes; dogs would lap up the sacrificial offerings; no one would have any right of ownership; and everything would turn topsy-turvy.”

Therefore, authorizing the state to prosecute for crime is necessary to ensure social order and to curb vigilantism. This is in consonance with the principle engrafted in Article 21 of the Constitution. State agencies investigate and prosecute, and the Courts (bound by the Constitution and laws) independently adjudicate and determine (a) innocence/guilt and (b) punishment. Thus when a court passes a sentence, it authorizes the use of state coercion against a person for committing an offence⁵ and is required to act within the confines of Article 21.

What is Sentencing

Sentencing is that phase of criminal justice system where the real punishment of the convict is chosen by the judge⁶. It takes after the stage of conviction and the proclamation of this punishment forced on the convict is a definitive objective of any justice delivery system. Sentencing is the point in the criminal justice process when the criminal law is both interpreted and applied. The sentences imposed on offenders affect more than simply the offenders themselves. Criminal sentences also impact specific victims and society at large. Public support and respect for the entire system is greatly influenced by sentencing decisions

The media report on sentencing relatively more often compared to other aspects of the criminal justice system. This makes the issue even more appealing to politicians and policy makers because it represents an opportunity to show the public that they are taking action with regard to an issue, crime,

in which everyone seems to have an interest (Marion and Farmer, 2003)⁷.

For some, the actions desired are more severe sentences in order to ‘make the punishment fit the crime’. Others seek sentences that will, in one way or another, keep offenders from recidivating. In other words, sentences should deter, incapacitate, or rehabilitate offenders. Support for one or the other of these philosophies continues to help shape sentencing policy in the India. Regardless of the theory of punishment one supports, nearly all the citizens would agree that the punishment should be fair and just in our criminal justice system. Accordingly everyone agrees that offenders convicted of similar crimes under similar circumstances deserve similar sentences. Thus, as a least common denominator, fairness in sentencing is most often associated with reducing or eliminating unwarranted disparity. Unwarranted disparity is that which is based on race, gender, or other factors not prescribed by law. What are not always agreed upon are the specific approaches that should be taken to achieve this goal.

There is no doubt in the fact that Criminal Courts have excelled in the art of fact finding and law applying but when it comes to the process of Sentencing, there lies the lacuna. The success in former is mainly due to unemotional and objective approach while failure in later owes to emotional and subjective reaction towards the circumstances surrounding the convict. This situation is further aggravated due to the lack of well-defined sentencing policy.

The modern attitude towards Sentencing is that, it is an individualized treatment process and a sure response to every events of crime. Therefore the main object of sentencing should be reformatory rather than punitive so as to facilitate the return of offender to normal life and serving the ultimate goal of prevention of crime.

Justice Krishna Iyer, in the very context observed that:

“The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make depreciation of life and liberty reasonable as penal panacea.”⁸

The fundamental reason of any criminal justice delivery system can be dictated by taking a gander at the sort of punishment given for different law violations. However in a system like our own, with such a variety of performers included separated from the accused and victimized person, it is unrealistic to anticipate that every one of them will respond in the same way to a specific demonstration of crime. For instance the exploited person may express stronger feelings than a judge who is an aggregate more peculiar to both the opposing parties.

The choices are numerous. In case of an exploited person (victim) centric system the most picked arrangement would be reclamation of the victimized person to the same position as he/she was in before the wrong had been caused. This is

⁴ OLIVELLE PATRICK, MANU’S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MANAVADHARMSASTRA 155 (Oxford University Press 2005)

⁵ ANDREW ASHWORTH, SENTENCING & CRIMINAL JUSTICE (6th ed. 2015)

⁶ <http://ijljs.in/wp-content/uploads/2015/03/NEED-FOR-SENTENCING-POLICY-IN-INDIA.pdf>

⁷ <http://diginole.lib.fsu.edu/islandora/object/fsu:181204/datastream/PDF/view>

⁸ *Kunju Kunju Janaratharan v. State of Kerala* (AIR 1979 SC 916)

generally utilized as a part of torts cases and by countries large in economic crimes. This can't be connected in all cases in instances of physical, emotional and psychological harm where restoration is once in a while conceivable. In such cases there are two options left – retribution and rehabilitation. Also in former the system focuses at judgment of the crime as more essential reason for punishing than whatever other. Rehabilitation is more accused friendly and trusts in reclamation for the individual over to the standard of the society. An alternate most supported justification for punishment is prevention (deterrence) the fundamental reason of which is prevention of reoccurrence of the same scene.

PARAMETERS OF SENTENCING

Sentences must be imposed in a way that it reflects the philosophical rationale and purpose behind its imposition. In India sentence is based on seriousness of the crime and not only to provide just punishment for the crime but also to act as a deterrent to criminal conduct and protect the community.

Punishment in India seeks to serve three fold purposes i.e. punitive, deterrent and protective. Courts must see that the public does not lose confidence in the judicial system, and imposing inadequate sentences would do more harm to the justice system and may lead to a state where the victim loses confidence in the judicial system and resorts to private vengeance. In any sentencing process and even in awarding the death penalty, there is a subjective element involved and that subjectivity is tasked to the Courts by the Parliament.

The element of subjectivity makes it impossible for Courts to lay down a straight-jacket judicial formula for imposition of a particular sentence, but the object of sentencing should be such that the crime does not go unpunished and the victim of the crime as also the society has the satisfaction that justice has been done. Disparity in sentencing adversely impacts both the victim and convict and creates doubts as to the efficacy of the Criminal justice system.

Need of Sentencing Policy in India

In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.⁹

Therefore, what this research points is to advance quickly the requirement for a sentencing policy. The issue with the current system as provided for in the Criminal Procedure Code is the variety in the outcome obtained from the same or comparative set of facts. Because of it, the judges are permitted to reach the decision in the wake of listening to the parties. However the factors, which ought to be considered while deciding the decision and those, which ought to be

⁹ Criminal Summary of Workshop dt. 22.3.2015 in Chandrapur District

maintained a strategic distance from, is not, indicated anywhere. This is the place the judge is relied upon to utilize his/her individual optional capacity to fix the punishment for the accused. This discretion eventually gets ill used in countless situations because of superfluous thought and utilization of personal prejudices. This is the essential explanation behind upholding a sentencing policy or guidelines.

This thesis will start the discussion by clarifying the procedure for sentencing in India and its application as of present stage. This is followed by a discussion of different opinions on sentencing policy – their focal points and inconveniences. The prerequisites the extent that India is concerned will be examined in the background of the Sentencing guidelines in UK and USA¹⁰ interspersed with the opinion of the many.

The essential aspect of sentencing in criminal law is that it grades offences and labels them according to proportionality. The threat of punishment is not only a conditional threat of a painful sanction. It is an official expression of how negatively different kinds of actions or omissions are judged.¹¹

Why Guidelines are required in the state

Post the 16 December 2012-Nirbhaya gang rape case, the Justice Verma Committee in 2013 in recommending enhancement of punishment for sexual offences noted that *“every member of the community is able to live his/her life because of the protection afforded by the community and the Rule of Law. But, when one member of the community shows ingratitude to the community by killing a fellow member of the community or when the community feels that its very existence is under threat, then for the purposes of self preservation, the community withdraws its protection. This withdrawal of protection results in imposition of death penalty.”*¹²

The Criminal Justice System of India also distinguishes between classes of crime. Indian Courts have noted that there are acts which are private in nature such as cheating, breach of trust etc. whereas others are public in nature.

In *Gian Singh v. State of Punjab*¹³, regarding the power of the Court to quash criminal proceedings, the Supreme Court held that heinous and serious offences of mental depravity or offences like murder, rape, dacoity, are not private in nature and have serious impact on society. Sentencing must reflect this distinction as well.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report

¹⁰ <http://ijlljs.in/wp-content/uploads/2015/03/NEED-FOR-SENTENCING-POLICY-IN-INDIA.pdf>

¹¹ N. Jareborg, *The Coherence of the Penal System*, in his *Essays in Criminal Law* (1988) as cited in ASHWORTH ANDREW, *PRINCIPLES OF CRIMINAL LAW* (6 th ed. 2009).

¹² Justice (Retd.) J. S. Verma, Report of the Committee on Amendments to Criminal Law 243 (2013).

¹³ (2012) 10 SCC 303 at ¶ 58.

that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences.

The Judge has wide discretion in awarding the sentence within the statutory limits¹⁴. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each single Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity in the system pertaining to the sentencing. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.¹⁵

There has been a gradual but sure decline of Public faith in the Criminal Justice system, over the period of time which give us a well-deserved opportunity to revisit and formulate a robust and truly democratic Sentencing policy. In this respect, the inclusion of a well informed and legitimate Public Opinion in Sentencing policy will not only increase its acceptance but also the much required transparency in the system.

COLLECTIVE CONSCIENCE OF SOCIETY

The basic aim of all modern welfare States in the world is to provide a safe and secure environment to its citizen, so that they can flourish and contribute towards the betterment of the society and its future at large. But the ever increasing graph of crime is a blatant proof that Criminal Justice system has failed miserably to fulfill this cherished dream.

Criminal courts determining sentences require judges to weigh the impact of the adequacy of a sentence on the society and in doing so, to consider the collective conscience of society which is a crucial element in awarding appropriate sentence. The role of the State is to act in ensuring public order and a balance in society. The different wings of criminal justice system i.e. prosecution, investigation etc. have to act in furtherance of this role.

This test of collective conscience was used in *Machhi Singh*¹⁶, *Union of India v. Sriharan*¹⁷ and *Raj Bala v. State of Haryana*¹⁸. In *Machhi Singh*'s case while discussing this concept of collective conscience, the Supreme Court held:

“ It may do so “in rarest of rare cases” when its collective conscience is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the

motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance.”¹⁹

In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences.

The Sentencing Procedure Under the Criminal Procedure Code, 1973

Though describing India's sentencing approach the Court has also asserted that “the impossibility of laying down standards is at the very core of the Criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.”²⁰

The Code provides wide discretionary powers to the judge once the conviction is resolved. Sentencing procedure is established under the Code of Criminal Procedure²¹.

Section 53 of the I.P.C in Chapter III deals with the kinds of punishments which can be inflicted on the offenders. They are as follows:

1. Death penalty,
2. Imprisonment for life,
3. Imprisonment,
4. Forfeiture of property and
5. Fine.

The Code discusses sentencing essentially in S.235, S.248²², S.325²³, S.360 and S.361.

S.235²⁴ is a piece of Chapter 18 managing an undertaking in the Court of Session. It coordinates the judge to pass a judgment of absolution or conviction and in case that conviction to take after clause (2) of the section Clause (2) of the sections gives the system to be followed in instances of sentencing an individual sentenced a wrongdoing (crime). The section gives a semi trial to guarantee that the convict is given an opportunity to represent himself and give feeling on the

¹⁹ Supra note 12 at ¶ 31-32.

²⁰ *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 2 S.C.R. 541, para. 26, available at <http://indiankanoon.org/doc/1837051/>

²¹ Code of Criminal Procedure, No. 2 of 1974, available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf>. Sentencing is covered under section(s) 235, 248, 325, 360 and 361 of the Code.

²² Section- Acquittal or conviction.

²³ Section- Procedure when Magistrate cannot pass sentence sufficiently severe.

(1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

²⁴ Section-Judgment of acquittal or conviction.

(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

¹⁴ Indian Penal Code, 1860 and Code of Criminal Procedure, 1973

¹⁵ <https://www.lawtopus.com/academike/sentencing-policy-the-need-of-the-hour/>

¹⁶ (1983) 3 SCC 470 at 32-40.

¹⁷ (2016) 7 SCC 1 at ¶ 87-88.

¹⁸ (2016) 1 SCC 463 at ¶ 16.

sentence to be forced on him. The reasons given by the convict may not be relating to the wrongdoing or be lawfully sound. It is only for the judge to get a thought of the social and individual points of interest of the convict and to check whether none of these will influence the sentence²⁵

This section doubtlessly gives that each individual must be given an opportunity to discuss the sort of punishment to be forced. A sentence not in consistence with S.235 (2) may be struck down as violative of natural justice. Under these conditions, sentencing guidelines will both increase uniformity and increase fairness.

However this method is not needed in situations where the sentencing is carried out as per S.360²⁶.

Also Section.248²⁷ goes under Chapter 19 of the Code managing warrants case. The provisions contained in this section are very much alike to the provisions under S.235. However this section guarantees no preference against the accused. For this reason it clearly mentions in clause (3) that in case that where the convict declines past conviction then the judge can, taking into account the proof given figure out whether there was any past conviction.

The judge anytime can't surpass his powers as provided under the code for the sake of watchfulness. In situations where the magistrate feels that the crime demonstrated to have been submitted is of more prominent power and must be punished seriously and on the off chance that it is outside the extent of his jurisdiction to honor the punishment then he may forward the case to the Chief Judicial Magistrate with the significant papers alongside his opinion.²⁸

The principle piece of judicial discretion comes in S.360, which accommodates arrival of the convict on probation. The point of the section is to attempt and reform those criminals in situations where there is no genuine risk to the general public. The same is achieved by restricting the extent of the section just to situations where the accompanying conditions exist, such as the following:

- Women declared guilty of offence the punishment of which is not death or imprisonment for life.
- Any individual underneath 21 years old declared guilty of offence the penalaction of which is not death or life imprisonment.
- A male over 21 years sentenced of an offence the punishment of which is fine or detainment of not over 7 years

In the above mentioned scenario, when there is no history of past conviction the court can, having thought to other significant components, for example, age, circumstances while carrying out the crime, character, mental condition, and so forth utilize its prudence and

discharge the convict on going into a bond with or without sureties.

On the off chance that a magistrate of II class and not approved by the High Court opines that the individual attempted merits the summon of this section then he may record his opinion and forward the case to the magistrate of I class. To empower the judge to get full realities of the case the section gives all rights to the judge for enquiry into the points of interest of the case.

Similarly if the crime submitted is of such nature that the punishment awardable can't be more that 2 years or a just fine then, having thought to the different factors joined with the convict, the court may leave the convict without a sentence at all after negligible caution. The court additionally makes strides on the off chance that the individual does not follow the principles set down at the time of discharge as gave under this area, for example, re-arrest of the person. For release under these provisions it is essential that either the convict or the surety are residing or go to regular occupation in the jurisdiction of the court.

The Code through S.361²⁹ makes the use of S.360 compulsory wherever conceivable and in situations where there are exceptional cases to state clear reasons. Wherever the punishment given is below the prescribed, recommended under the important laws the judge must give the unique explanation behind doing as such. The oversight to record the special reason is an anomaly and can set aside the sentence passed on the ground of failure of justice. These provisions are accessible just to trials under the watchful eye of the Court of Sessions and the trials of warrants case.³⁰ The Probation of Offenders Act, 1958 is very much alike to S.360 of the CrPC. It is more expandable as in it unequivocally accommodates conditions going with release order, a supervision request, payment of compensation to the affected party, forces and issues of the post trial supervisor and different particulars that may fall within the ambit of the field. S.360 would stop to have any power in the States or parts where the Probation of Offenders Act is brought into force.

PREVAILING SCENARIO IN INDIA

After looking at the provided statutory guidance under the criminal procedure code, we shall assert a look at the proficiency of the order in its plane application. The discretion accommodated under the current procedure is guided by ambiguous terms, for example, 'circumstances of the crime' and 'mental state and age'. Quite simply, these can be dead set however when will they have an impact on the sentence is the inquiry left unanswered by the legislature.

Aside from the personal biases and prejudice the thought of what constitutes justice and what is the reason for

²⁹ Special reasons to be recorded in certain cases. Where in any case the Court could have dealt with,-

(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or
(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so.

³⁰ Supra n.6 563-575

²⁵ <http://ijlls.in/wp-content/uploads/2015/03/NEED-FOR-SENTENCING-POLICY-IN-INDIA.pdf> -R.V.Kelkar vs. K.N.Chandrasekharan Pillai 2002(Rep., 2003)

²⁶ Section 360- Order to release on probation of good conduct or after admonition.

²⁷ Supra n.8

²⁸ Section 325 of Crpc

punishment differs from individual to individual. For example, on account of *Gentela Vijayavardhan Rao v. Condition of Andhra Pradesh*³¹, the litigant had with the thought process to rob, burnt a bus loaded with passengers, bringing about the demise of 23 passengers. The sentence given by the judges of the lower court was capital punishment for convict A and 10 years of rigorous imprisonment for convict B.

This was tested by the convict. The apex court cited from the judgment *Dhananjay Chatterjee v. Condition of West Bengal*³² to support its view to uphold the judgment:

"Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminal Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime."

For instance, each crime has going hand in hand with circumstances yet which ones qualify as mitigating and which once go about as irritating circumstances is something which is left for the judge to choose. Subsequently if one judge decides a specific situation as mitigating this would not (aside from a pitiful precedential worth) keep an alternate judge from disregarding that angle as immaterial. (*Suresh Chandra Bahri v. State of Bihar*)³³. This absence of consistency has urged a couple of judges to abuse the discretionary on the premise of their individual prejudices and biases.

Also on account of *Gurdev Singh v. State of Punjab*³⁴ the court affirmed capital punishment forced on the appellant remembering the exasperating circumstances³⁵.

Despite the fact that on the substance of it this may be only a brutal revenge for the crime done by the convicts, but on a deeper examination one can acknowledge from the judgment that the demonstration was totally indefensible (unforgivable) for the judges. This can't be expressed to be the failure of the judges to feel sympathy. This is simply an impression of their values.

Then again, *MohdChaman v. State*³⁶ the courts have shockingly diminished the sentence of capital punishment to

³¹ AIR, 1996 SC-2791

³² 1994, 2SCC-220

³³ AIR1994SC2420- this sentencing variety is sure to happen in light of the differing degrees of earnestness in the offence and/or shifting attributes of the guilty party himself. In addition, since no two offences or guilty parties can be indistinguishable the charge or name of variety as difference in sentencing essentially includes a worth based judgment. i.e., uniqueness to one individual may be a just advocated variety to an alternate. It is just when such a variety takes the type of distinctive sentences for comparable wrongdoers conferring comparative offences that it can be said to frantic sentencing

³⁴ AIR, 2003 SC-4187

³⁵ The exasperating circumstances of the case, on the other hand, are that the appellants, having realized that on the following day a marriage was to happen in the place of the complainant and there would be parcel of relatives present in her home, came there on the night of 21.11.1991 when a banquet was going on and began terminating on the guiltless persons. Thirteen persons were executed on the spot and eight others were truly harmed. The appellants from that point went to an alternate place and slaughtered the father and sibling of PW-15. Out of the thirteen persons, one of them was seven year old youngster, three others were at the edge of their lives. The after death reports demonstrate their age ran between 15 to 17 years.

thorough detainment of life because of the conviction that the blamed is not a threat to the society and thus his life require not be taken. The accused in this situation had abhorrently raped and murdered a one and a half year old kid. The lower courts having seen the circumstance as the rarest of the rarest cases imposed capital punishment.³⁷ The apex Court switched this, as it was not persuaded that the demonstration was sufficiently meriting the death penalty. The inquiry to be tended to here, having the powerlessness to declare the circumstances equitably, how would we choose which is the most favored.

The apex Court switched this, as it was not persuaded that the demonstration was sufficiently meriting the death penalty. The inquiry to be tended to here, having the powerlessness to declare the circumstances equitably, how would we choose which is the most favored.

judgment. Had the same issue be tended to in the other way around way, the previous convict would have been in the prison and the last would have died. How supportive would a rule be to this situation? A rule if set down would chiefly have an essential reason for punishing (whatever this basis may be - retribution is the basic reason or rehabilitation and reclamation is a definitive objective).³⁸ This essential justification would help the judge's figure out what precisely needs to be attained to of the punishment. Taking off from here, the mitigating and disturbing circumstances can likewise be effortlessly decided once the essential method of reasoning is clear. Representing this point, in case of *Raju v. State*³⁹ the Courts decreased the punishment beneath the base endorsed in the statute for reasons, which in the conclusion of the author are exceptionally silly.

The judge considered the asserted "immoral character and loose moral of the victimized person" and lessened the sentence for the accused to the term served. Had there been an agreeable evidence of a victimized person centric penal system, a judgment which profits the accused for the issues for the exploited person (victim) won't be conveyed. In *State of Karnataka v. S. Nagaraju*⁴⁰ the judge indicted the accused all the more as an obstacle measure to anticipate other potential guilty parties than to punish that specific convict.

It is not claimed that in the above situations and numerous other comparable ones the judges are unreasonable or unjust. The main point set for the perception is varieties in the thought of justice and this radically influences the societal interest of what the judiciary must do in a specific state of affairs. There have been judges like Krishna Iyer who have taken

³⁶ 2001, CriLJ-725

³⁷ The Indian Judiciary had firmly felt the need to have a sentencing rule at any rate to the degree of burden of capital punishment. In this way in the instances of *Bachan Singh v. State of Punjab* and along these lines for the situation *Machhi Singh v. State of Punjab*, the Court set out the 'rarest of the rarest test' by which capital punishment ought to be forced in just outstanding circumstances and such uncommon reasons must be recorded. This was followed in various cases both to spare the life of the blamed and to approve the burden for capital punishment

³⁸ Andrew Ashworth, Sentencing and Criminal Justice, 2005 4th edition

³⁹ AIR, 1994 SC-222

⁴⁰ 9JT2002 (Suppl1) SC7

rehabilitation and reclamation to an alternate level of comprehension. In the well-known instance of *Mohammad Giasuddin v. Condition of Andhra Pradesh*⁴¹ 20 he clarified punishment as under:

“Dynamic criminologists over the world will concur that the Gandhian determination of offender as patients and his origination of prisons as healing facilities - mental and moral - is the way to the pathology of delinquency and the remedial part of punishment.”

ROLE OF VICTIM IN SENTENCING

Justice Malimath Committee in 2003 found that no substantial rights to victims existed in the Criminal Procedure Code and hence made recommendations in regard to the right of the victim to participate in serious crimes cases and for adequate compensation to victims.⁴² In 2009, a proviso was inserted to Section 372 through the Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009), to confer a substantial right of appeal on victims and not limit them to challenging an acquittal through revision power (S.397 to 401 of the CrPC).⁴³ Pro-victim initiatives and restorative justice, have also raised questions about the categorization of crimes, “as offence against the State” and the involvement of victims in decision-making in criminal justice system⁴⁴.

Courts have held that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. Reference maybe made to *Mohfil Khan v State of Jharkhand*⁴⁵; *Purshottam Dashrath Borate v State of Maharashtra*⁴⁶

“Dynamic criminologists over the world will concur that the Gandhian determination of offender as patients and his origination of prisons as healing facilities - mental and moral - is the way to the pathology of delinquency and the remedial part of punishment.”.

Sentencing strategy and its contents

Having presented a case for the requirement for having a sentencing rule and policy, it is currently important to research its contents. There have been various suggestions and juristic opinion on what would constitute and ought to constitute sentencing policy. So as to prepare oneself to examine such a suggestion it is important to comprehend the effectively proposed policy. This would help in getting a handle on the soul of the activity and co-ordinate a more wholesome product as a result.

⁴¹ AIR, 1977SC-1926.

⁴² 8 Dr. Justice V. S. Malimath, Committee on Reforms of Criminal Justice System (2003)

⁴³ “Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.” Code of Criminal Procedure, 1973, § 372, No.2, Acts of Parliament, 1974 (India)

⁴⁴ Supra note at 1

⁴⁵ (2015) 1 SCC 67 at ¶ 63-65

⁴⁶ (2015) 6 SCC 652 at ¶ 26-45

The 35th Law commission⁴⁷ investigate Capital Punishment exhaustively discloses different angles identifying with sentencing focusing all the more nearly on capital sentencing. The examination in the report on the codification of the elements to guide the circumspection vested in the judge for granting the death penalty can be stretched out to the general discussion on Certainty and Predictability vs. Judicial Discretion⁴⁸. The reaction from a Rajya Sabha part and Inspector-General prompted the narrowing down of the affecting elements to energy, opportunity, obtained propensity, craziness and innate instinct⁴⁹.

Nevertheless to the extent that India is concerned, the Indian Penal Code furnishes judiciary with an expansive grouping and degree of punishment. This has been further cut by different judicial decisions on sentencing. However these decisions of the court experience the ill effects of the accompanying hindrances:

- (1) Facts particular
- (2) Same are not after by the lower courts
- (3) More of a legislative job
- (4) Whims and fancies of the judges

- (1) Facts in particular:-

Though these rules are given as Obiter Dicta, the utilization of such rules is deceiving in the resulting judgments. At present the settled Guideline emulated by the courts is regarding capital punishment as clarified previously. The utilization of this test on account of *A. Devendran v. Condition of Tamil Nadu* clarifies this point.⁵⁰ This was an instance of triple homicide. However the Court held that the trial court was not defended in recompensing capital punishment as the blamed had no planned arrangement to execute any individual and as the principle item was to submit burglary. This case ought to be contrasted and *Gentela Vijayavardhan Rao v. Condition of Andhra Pradesh* examined previously. The intention in both is to loot the victimized person. However for one situation it has been utilized as an exasperating factor and the other it is utilized as an mitigating component. This shows how the same test has been conflictly connected.

- (2) Not took after by lower courts:-

Another side of the coin is that the lower courts don't take after these rules as they are not binding on them. The points of reference are generally disregarded or separated from the current actuality situation to give the judge his space to rule on the case.

- (3) More of a legislative job:-

More significantly, it is the job of the legislature to make rules and of the legal to decipher and uphold it. It would not be satisfying or right to expect and permit the judges to casing the guidelines without anyone else's input.

- (4) Whims and fancies of the judges

A last reason in respect to why the legal ought not outline the standards is that it by and by comes down to the whims and fancies of the judge encircling it. This would just be a

⁴⁷ <http://lawcommissionofindia.nic.in/cpds1.pdf>

⁴⁸ 35th Law Commission Repot, 1967, pp190 - 202

⁴⁹ <http://ijlls.in/wp-content/uploads/2015/03/NEED-FOR-SENTENCING-POLICY-IN-INDIA.pdf>-It should be however remembered that this report was made in 1967 and its applicability need not be complete. The author merely drew support for the argument put forth.

⁵⁰ AIR, 1998SC-2821

negligible expansion of the conviction of one judge over all others.

Crimes and Judicial Sentencing Guidance

In the Supreme Court's judgment in *Soman v. Kerala*, the Court cited a number of principles that it has taken into account "while exercising discretion in sentencing," such as proportionality, deterrence, and rehabilitation.⁵¹ As part of the proportionality analysis, mitigating and aggravating factors should also be considered, the Court noted.⁵²

Aggravating Circumstances:

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
2. The offence was committed while the offender was engaged in the commission of another serious offence.
3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
5. Hired killings.
6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
7. The offence was committed by a person while in lawful custody.
8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.
9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
11. When murder is committed for a motive which evidences total depravity and meanness.
12. When there is a cold blooded murder without provocation.
13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or

emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.
3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.
5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

While determining the questions relatable to sentencing policy, the Court has to follow certain principles and those principles are the deciding factor besides the above considerations in imposition or otherwise of the death sentence.

In *State of M.P. v. Bablu Natt*, the Supreme Court stated that "The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with."⁵³

Moreover, in *Alister Anthony Pareira v. State of Maharashtra*, the Court held that

"sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."⁵⁴

⁵³ State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 13, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=33425>

⁵⁴ Alister Anthony Pareira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 69, available at <http://indiankanoon.org/doc/79026890/>

⁵¹ Soman v. State of Kerala, (2013) 11 S.C.C. 382, para. 13

⁵² Id. para. 14.

The Hon'ble Apex court in *State of Madhyapradesh v. Mehtab*, (Cri. Appeal no. 290/2015, dated 13.02.2015) has observed that, "we find force in the submission, it is the duty of the court to award just sentence to a convict against whom charge is proved. While mitigating and aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and the society."⁵⁵

Importance of Public Opinion in Sentencing Policy:

From the above mentioned cases and judicial observations it can be concluded that there is an absolute requirement of Sentencing Policy in India. Judiciary is going through a phase of lack of confidence because of an established model which is opaque, non-responsive and devoid of accountability in covering every possible circumstances. Judiciary is believed to be an elite class and its isolation from Public is considered to be legitimate and essential because it imparts a sense of authority to it. In India the Courts have got exclusive privilege to interpret the Law and to stretch its meaning to such an extent which sometimes causes interference in the working of other instrumentalities of the State. Now the question arises how far the basic meaning be extended so that it do not lead to the breakage of social network.

To impart legitimacy to the Criminal Justice system and more specifically the Sentencing policy, it is necessary to give due importance to the Public Opinion. Public Opinion is often confused with Media dominated reactionary utterances of people, popularly known as Opinion Polls, which is far away from accuracy and reasonableness. The response given by the people is mostly based upon his socio-politico-cultural affiliation and is largely emotional in nature. The problem lies not in the Public but the way in which the problem is being put forward before them. Media, which nowadays represent large business conglomerates, generally take up some ongoing controversies and gives an emotional angle to it before putting it in public domain, which make them highly unreliable. This practice is fundamentally wrong because it defeats the very purpose of Opinion Polls right at its nascent stage. The practice should be, to first of all give relevant factual description along with constraints and possible ramifications and then take a well 'Informed' Opinion Poll. In the exercise of Informed Opinion Poll, 'deliberation' plays a very important role.⁵⁶ The target of Informed Public can be achieved by initiating a well- managed Public debate. This will help in transformation of individualistic view into a rationale Public view on Sentencing policy.

Two extreme views can be adopted while deciding the Sentencing policy- one based on 'Isolationism' and another

based on 'Populism'⁵⁷. In Isolationistic view Public has little or no knowledge of Sentencing policy and the Policy Makers are also not concerned about it. The main criticism of this approach would be that it is highly undemocratic and will create disconnect and disenchantment among Public. Furthermore, since there is no Public role in policy forming, it will give chance to the Politicians to put an undue pressure on the Judiciary as and when required, and in case of any unpopular decision by Court, the Public will stand against Judiciary.

In case of Populist view the Public will not understand the underlying principle behind the Sentencing policy. The Public perception will depend upon Media driven promulgation which in turn may be controlled by some Political motive or some emotional narration presented to them.

The somewhat appropriate approach lies somewhere in between. The Public should be first educated and then consulted on the policy matter. A constructive debate should be initiated so that a consensus on the policy can be arrived at. The Judges and other Law officials should outreach the people, like taking seminar, because in most of the cases the Public is being misrepresented about Sentencing policy.

Public Opinion is much more complex as it is being perceived by the Policy Makers. Very often they will come across a wide range of views regarding a particular prospective policy decision regarding Sentencing. It is a boon in disguise because it gives ample opportunity to them to introduce alternative Sentencing reforms, which if introduced will not only make decision process faster but also reduce the economic burden of the policy. These reforms can be made acceptable to the society by involving them in discussions which might not be acceptable to them individually.

It is not always necessary that just by increasing the severity of the Sentence a valid deterrence can be created in the mind of prospective convict. For example after recent *Nirbhaya case*⁵⁸ a popular demand which have been vindicated by Media and Public is that to award Death Sentence to the rape convict. But the Policy Makers should make them understand that Death Sentence falls in '*rarest of rare*' category and burden of proof so required will be quite high. Thus it may lead to lesser conviction. Only by involving Public in discussions this stand can be made clear.⁵⁹

⁵⁵

PAPER ON THE TOPIC OF SUSPENSION OF SENTENCE BY THE TRIAL COURT AND SENTENCING POLICY
<http://mja.gov.in/Site/Upload/GR/Gist%20of%20Workshop%20Paper%20on%20Sentencing%20Policy.pdf>

⁵⁶ Barasbus J. (2004) "How Deliberation Affects Policy Opinion" *American Political Science Review*, 98 (04); p. 687-701
[xviii] Public Opi

⁵⁷ Public Opinion and the Media Seminar (8 February 2008) '*Prisons and the Public*' Julian Roberts, Centre of Criminology, University of Oxford

⁵⁸ *State v. Ram Singh and Ors.*, SC No. 114/2013

⁵⁹ <https://www.lawctopus.com/academike/sentencing-policy-the-need-of-the-hour/>